SUPREME COURT, U. S.

FILED

SEP 20 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-358

JNO. McCALL COAL COMPANY, INC., a MARYLAND CORPORATION, CLYBORNE. INC., a WEST VIRGINIA CORPORATION, and VERNICE H. CLYBORNE, EXECUTRIX OF THE WILL OF C. A. CLYBORNE, DECEASED,

Petitioners,

v.

RUTH M. CULBERTSON, EXECUTRIX OF THE WILL OF WILLIAM M. CULBERTSON, JR., DECEASED, LAST SURVIVING PARTNER OF THE PARTNERSHIP OF J. H. FRANKS AND WILLIAM M. CULBERTSON, JR., DOING BUSINESS AS WHITEWOOD SMOKELESS COAL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the

above entitled case on May 1, 1974, rehearing denied July 2, 1974.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court entered on October 12, 1967, printed in the Appendix, *infra*, p. 1a, is reported in 275 F.S. 662. The Memorandum Decision and Judgment Order of the District Court entered on December 15, 1972, printed in the Appendix, *infra*, p. 79a, is unreported. The opinion of the Court of Appeals, printed in the Appendix, *infra*, p. 57a, is reported in 495 F.2d 1402. The order of the Court of Appeals denying the Petition for Rehearing, printed in the Appendix, *infra*, p. 92a, is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 1, 1974. A timely Petition for Rehearing was denied on July 2, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

Decisions of this Court have established that in order for there to be a proper review of the action of a lower court there must be a fair compliance with the requirement of Rule 52 of the Federal Rules of Civil Procedure that the court make findings of fact. Other decisions establish that a complaint in equity must be dismissed when it is determined that the plaintiff has not come into court with clean hands. The questions presented are:

1. May a court of appeals affirm a judgment of a district court in favor of the plaintiff in an equity proceeding where:

(a) One defense is that the plaintiff has not come into court with clean hands;

(b) The record contains substantial evidence with respect to such defense;

(c) The district court has not stated any findings of facts or conclusions of law with respect to such defense; and

(d) The opinion or memorandum of decision contains no reference to such defense.

2. May a court of appeals decide a case on review without considering and passing upon all matters of error raised by the appeal.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Amendment V to the Constitution of the United States of America:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rules of Civil Procedure, Rule 52(a) (As amended January 21, 1963, effective July 1, 1963), 374 U.S. 887:

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Federal Rules of Civil Procedure, Rule 53(e) (I), 308 U.S. 727:

(e) Report.

(I) Contents and Filing. The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

STATEMENT OF THE CASE

Petitioner Jno. McCall Coal Company, Inc. ("McCall Coal") is engaged in buying and selling coal and in acting as an agent for coal companies. Petitioner Clyborne, Inc. was engaged in similar businesses and acted as an agent for McCall Coal. C. A. Clyborne ("Clyborne", now deceased) was the president and owner of all of the stock of Clyborne, Inc. and controlled and managed it. William M. Culbertson, Jr. ("Culbertson", now deceased) and J. H. Franks ("Franks", now deceased) were partners trading as Whitewood Smokeless Coal Company ("Whitewood") which was engaged in mining and selling coal.

By a written lease (the "Lease") dated June 20, 1947, Franks and Clyborne as lessors leased to Culbertson and Franks as Lessees "all of the Cary Seam deep mining rights" on certain lands in Virginia (the "Leased Lands"). The Lease provided, *inter alia,* that Clyborne or his assignee should be the exclusive distributor for all coal mined and produced from the Leased Lands, would use reasonable and diligent efforts to sell the coal for the best price available and would receive a sales commission of 20¢ per ton, subject to an increase to 8% of the selling price. Clyborne assigned his rights as exclusive distributor to McCall Coal, which in turn used Clyborne, Inc. as its agent. Mining operations were conducted on the Leased Lands until sometime in 1955.

The present suit was started by a complaint (the "Original Complaint") which was filed in the United States District Court to the Southern District of West Virginia, at Bluefield, by Culbertson as sole plaintiff[1]

[1] In the Original Complaint Culbertson claimed that the partnership had been dissolved in 1954 and that he individually had acquired all of the assets, including any claims against the defendants. The District Court determined that this claim was unfounded and ordered that Franks be made an involuntary plaintiff.

against McCall Coal, Clyborne, Inc. and Clyborne as defendants.

The basis for jurisdiction by the District Court is 28 U.S.C. Section 1331. Culbertson and Franks were each citizens of Virginia. McCall Coal was incorporated and had its principal place of business in Maryland. Clyborne, Inc. was incorporated and had its principal place of business in West Virginia, and Clyborne was a citizen of West Virginia. The amount in controversy exceeded $10,000, exclusive of interests and costs.

The Original Complaint alleged that approximately 244,300 tons of coal had been mined from the Leased Lands and delivered to the defendants; that the defendants had sold the coal and made payments which purported to be (and were accepted by Culbertson and Franks as being) the prices received by the defendants less the agreed commissions; that there had never been any accounting between the parties nor a request for an accounting; that Culbertson had recently obtained information indicating that the defendants had willfully and intentionally under-reported the prices received by them; and that the defendants had refused to permit an examination of their books and records. The relief sought was for discovery and accounting, the award of any amount found due on the accounting, with interest, an award of punitive damages and a recovery of commissions on sales which were willfully and intentionally under reported.

The defendants filed an answer (the "Original Answer") setting up as defenses the statute of limitations and a further claim that through January 1949 McCall Coal had paid Whitewood the amounts received from the sale of the coal less commissions at the rates specified in the Lease; that effective February

1, 1949 it was agreed that this part of the Lease would be terminated and McCall Coal would pay prices as agreed upon from time to time; and that such agreed prices had been paid.

Following miscellaneous discovery proceedings in which the plaintiffs ascertained the books and records of McCall Coal which contained data with respect to the coal, the plaintiffs filed a motion under Rule 34 of the Federal Rules of Civil Procedure to require the production of such books and records. The District Court denied this motion without prejudice to renewal after an evidentiary hearing, which was thereafter held, and following which the District Court granted the motion.

During the course of this hearing and miscellaneous discovery proceedings subsequent to the hearing it was established that the coal which was delivered to McCall Coal did not consist solely of Cary Seam coal mined from the Leased Lands, but also consisted of other coal, including an inferior coal known as Jawbone coal. The District Court then permitted the plaintiffs to file a second amended and supplemental complaint[2] (the "Amended Complaint"). It was alleged in the Amended Complaint that Whitewood had with the knowledge, consent and approval of the defendants purchased a substantial quantity of coal not mined from the Leased Lands; that it had shipped and delivered this coal to McCall Coal with the understanding that McCall Coal would account for the sales proceeds in the same manner, on the same basis and for the same sales commissions as in the case of coal mined and produced by Whitewood from the Leased Lands; and that McCall

[2] The only change which had been effected by the amended and supplemental complaint had been to add Franks as an involuntary plaintiff.

Coal had not so accounted for the proceeds from the sale of the purchased coal.[3]

In their answer to the Amended Complaint the defendants, in addition to pleading the statute of limitations and denying the factual allegations, pleaded as defenses that the Amended Complaint was not filed in good faith because the allegations were directly contrary to Culbertson's testimony at the Rule 34 hearing; that unless the Lease had been modified as of February 1, 1949 as claimed by the defendants, Whitewood had been guilty of fraud in making sales to others; and that Whitewood had been guilty of fraudulent conduct which foreclosed it from relief in a court of equity by reason of its having acquired inferior coal which, without the knowledge of the defendants, it used in filling orders from McCall Coal with the intention that on resale the coal would be represented as being Cary Seam coal mined from the Leased Lands and it would get a higher price than would have been received if the inferior coal had been sold as such.[4]

Concurrently with authorizing the filing of the Amended Complaint the District Court, over the objection by the defendants, referred all issues of fact and law to a special master, who was directed to take evidence and report his findings of fact and conclusions of law to the court.

Hearings were held before the special master and evidence was submitted on all of the issues which were

[3] The Amended Complaint also made other claims which were ultimately decided adversely to the plaintiffs and are not here involved.

[4] The Amended Answer also pleaded two counterclaims which were decided adversely to the defendants and are not here involved.

raised by the Original and Amended Complaints and the Original and Amended Answers. The evidence with respect to the defense that Whitewood had engaged in fraudulent conduct which foreclosed it from relief in equity, including both evidence at the Rule 34 hearing and evidence submitted to the special master, showed that:

(a) The coal which Whitewood delivered to McCall Coal consisted of a mixture of Cary Seam coal mined from the Leased Lands, Jawbone coal mined by Whitewood under a different lease, purchased Jawbone coal and other purchased coals, some of which were Cary Seam coal and some of which were not;

(b) Whitewood knew that Jawbone coal was inferior to Cary Seam coal and normally sold for a lower price;

(c) Whitewood knew that substantial parts of the coal delivered by it to McCall Coal was being resold by McCall Coal under contracts which called for Cary Seam coal mined from the Leased Lands which met certain specifications;

(d) Whitewood's purpose in acquiring the inferior coal and mixing it with the Cary Seam coal was to make more money;

(e) Whitewood deliberately started the adulteration because of claimed knowledge that a mine with which Clyborne was associated was similarly adulterating coal shipped by such mine;

(f) At least some of the mixing was done without the defendants' knowledge and was not stopped until the defendants made objection after discovery;

(g) a part (approximately 25%) of the admixed Jawbone coal was concealed by reporting it as Cary Seam coal on royalty reports; and

(h) The mixture of coals which was shipped by Whitewood to McCall Coal contained about 18% of inferior coals.

The existence of adulteration is undisputed, although Whitewood has disputed the extent of the adulteration and of defendants' knowledge thereof.

The report of the special master (Appendix, p. 43a, *infra*) contained findings of fact and conclusions of law with respect to all issues raised by the pleadings with the exception of the issue of whether Whitewood was guilty of fraudulent conduct which precluded the granting of relief to it by a court of equity, which is not mentioned or averted to in any way in the report. The defendants filed timely exceptions to the report, in which they specified this failure by the special master to deal with this issue as one of the grounds for exception.

The District Court in its Memorandum Decision and Judgment Order (Appendix, p. 79a, *infra*) confirmed the report of the special master as filed and rendered a judgment against the defendants in favor of the plaintiffs for $176,196.80. The items going to make up this judgment consisted of (a) amounts of determined underpayments plus interest thereon, (b) commissions previously deducted with respect to the sales on which there had been underpayments, (c) estimated profits of an affiliated corporation from a resale to some of the coal plus interest thereon and (d) commissions previously deducted with respect to the sale of this coal to the affiliated corporation. This Memorandum Decision and Judgment Order does not either mention or avert to the issue of whether Whitewood was guilty of fraudulent conduct which precluded the granting of relief to it by a court of equity.

The defendants filed a timely appeal from this judgment.[5] Five issues were raised by this appeal, of which one was:

> "Were the Plaintiffs guilty of 'unclean hands' to an extent which would deny them relief in a court of equity."

In their original brief the defendants (a) stated the facts upon which they relied to establish the existence and extent of the adulteration and the fraudulent purpose thereof; (b) expressly called the attention of the Court of Appeals to the erroneous failure of the special master to make findings of fact and conclusions of law with respect to this defense and the erroneous failure of the District Court to take action on the defendants' exception to this failure of the special master; (c) cited the decisions which establish the right of an appellate court to apply the doctrine of "unclean hands" without remand to the lower court; and (d) requested the Court of Appeals to reverse the judgment and remand the case with a direction to dismiss the complaint.

The plaintiffs in their reply brief admitted the existence of the adulteration, although they disputed the extent thereof, and simply contented themselves with assertions that McCall Coal had condoned Whitewood's conduct and waived any claim and that in any event the shipments of adulterated coal would not be sufficient to defeat Whitewood's recovery.[6] There was no citation

[5] There was also a cross-appeal by the plaintiffs which was decided adversely to them and is not here involved.

[6] The claim of condonation appears to be based on the fact that after it discovered the adulteration from admixing Jawbone coal McCall Coal continued to buy coal from Whitewood and did not make any claim on account of the adulteration. The assertion that the shipments of adulterated coal would not be sufficient to defeat Whitewood's recovery appears to be based on the claimed limited extent of the adulteration and the fact that the ultimate customers had accepted the coal with infliction of penalties.

of authority to establish the legal *validity of* these contentions.

The defendants in their reply brief pointed out the factual errors in the plaintiffs' reply brief and again urged the Court of Appeals to find that Whitewood had been guilty of "unclean hands" and to direct dismissal of the complaint.

Notwithstanding that this issue and defense, and the facts and law in support thereof, were squarely presented to the Court of Appeals, it made no mention of them in its opinion. To the contrary, as appears from its opinion (Appendix p. 89a, *infra*), it treated the defendants' appeal as being based solely on claims that findings of fact with respect to two other issues were clearly erroneous.

The defendants filed a timely Petition for Rehearing, in which they called to the attention of the Court of Appeals to the failure to consider the defense of "unclean hands" and the facts and law in support thereof, and again urged the Court to consider this defense, to find that Whitewood had been guilty of "unclean hands" and to direct the dismissal of the complaint. This Petition for Rehearing was filed with a conditional request that the Petition be considered in banc if not granted by the panel for the reason that:

> "* * * denial by default or lack of consideration of rights of litigants to have the courts consider and pass on all issues which are raised by the pleadings and in respect of which substantial evidence is submitted involves a question of judicial procedure and administration which is of exceptional importance."

The Petition for Rehearing and the conditional request for rehearing in banc were both denied by a short order.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision.

The special master failed to make any findings of fact and conclusions of law with respect to the issue of whether Whitewood had been guilty of fraudulent conduct which foreclosed it from relief in a court of equity, notwithstanding that this issue had been raised by the pleadings and substantial evidence with respect thereto had been introduced. Since the order of reference directed the special master to report his findings of fact and conclusions of law, this failure by the special master constituted a violation of Rule 53(e)(I) of the Federal Rules of Civil Procedure.

Notwithstanding the defendants' exception to the failure of the special master to make findings with respect to this issue, the District Court treated the defendants' exceptions as being purely factual and adopted and confirmed the special master's report in all respects, without even mentioning the issue of whether Whitewood had been guilty of fraudulent conduct which foreclosed it from relief in a court of equity and, consequently, without finding the facts with respect thereto or stating its conclusions of law thereon. This constituted a violation of the requirement of Rule 52(a) of the Federal Rules of Civil Procedure that "the court

shall find the facts specially and separately state its conclusions of law thereon."

One of the issues raised on the appeal to the Court of Appeals was the above-described failures by the special master and the District Court to consider the issue of whether Whitewood had been guilty of fraudulent conduct which foreclosed it from relief in a court of equity. In this connection the attention of the Court of Appeals was specifically directed to the rule that the question of whether or not a plaintiff in an equity proceeding has been guilty of conduct which forecloses it from relief may be resolved directly by the appellate court, whether or not it has been considered by the lower court. The Court of Appeals treated the appeal as merely challenging the correctness of the findings of fact which had been made and affirmed the judgment of the District Court without mentioning in any way the issue of whether Whitewood had been guilty of fraudulent conduct which foreclosed it from relief in a court of equity and, consequently, without making any determination either with respect to the failure of the special master and District Court to consider this issue or itself making any determination with respect to whether Whitewood had been guilty of conduct which foreclosed it from relief in a court of equity.

This non-action by the Court of Appeals constituted both a sanctioning of a departure by the District Court from the usual course of considering every issue raised by the pleadings and making findings of fact and conclusions of law with respect thereto and a departure by the Court of Appeals from the usual course of procedure of appellate courts to consider and decide, if necessary, every substantial issue raised by an appeal.

This departure by the Court of Appeals from the accepted and usual course of judicial proceedings and the concurrent sanctioning of such a departure by the District Court were reiterated and emphasized when the Petition for Rehearing was denied and the conditional request for rehearing in banc was also denied.

These repeated failures by the District Court and the Court of Appeals to consider and take action with respect to an issue which, if decided in favor of the defendants, would have compelled a dismissal of the complaint and entry of judgment in their favor, regardless of the disposition of any other issue, constituted a denial of due process to the defendants. This character of these failures was expressly called to the attention of the Court of Appeals by the Petition for Rehearing. The action of the Court of Appeals in denying the Petition for Rehearing and the conditional request for rehearing in banc constituted a deliberate decision by the Court of Appeals to deny the defendants' constitutional right to due process and therefore calls for an exercise of this Court's power of supervision.

The maxim that "He who comes into equity must come with clean hands" is ancient and well-established, both in West Virginia[7] and in the federal courts. *Wheeling Dollar Savings & Trust Co. v. Hoffman,* 127 W. Va. 777, 35 S.E.2d 84 (W. Va. 1945); *Precision Instrument Mfg. Co. et al. v. Automotive Maintenance Machinery Co.,* 324 U.S. 806, 65 S. Ct. 993, 89 L. Ed. 1381 (1945). It

[7] Jurisdiction in the present case is based on diversity of citizenship, with the consequence that matters of substance are determined under state law. It is not necessary to decide whether the application of this doctrine is a matter of substance or a matter of procedure, since both the federal law and the law of West Virginia are the same.

may be given effect at any time, either by the trial court or an appellate court, and either at the suggestion of a party or *sua sponte* by the court. *Wheeling Dollar Savings & Trust Co. v. Hoffman, supra; Dye v. Dye et al.*, 128 W. Va. 754, 39 S.E.2d 98 (W. Va. 1946); *Gaudiosi et al. v. Mellon et al.*, 269 F.2d 873 (CCA 3, 1959). One of the principal applications of this doctrine is to deny affirmative relief in a court of equity to a litigant who seeks to recover benefits from a transaction which is tainted with fraud, even in those cases where the defendant is claimed to be equally guilty.

In the present case the defendants pled as a defense that Whitewood engaged in the fraudulent scheme of adulterating its higher quality coal with lower quality coal and delivering the adulterated mixture to McCall Coal, with the knowledge that on resale it would be represented as consisting of the higher quality coal and the intent of getting a higher price than could otherwise be obtained for the lower quality coal. These pleaded facts would, if supported by the evidence, require a denial of relief to Whitewood without regard to the disposition of any other issue.

The evidence fully supported the existence and carrying out of the alleged fraudulent scheme. In fact, the existence of the fraudulent adulteration is not seriously disputed, and Whitewood has limited itself to contentions as to the *extent* of the adulteration and to defenses in the nature of confession and avoidance, such as claimed condonation by McCall Coal, the payment of penalties by Whitewood and the alleged perpetration of similar frauds by another mining company.

It is not necessary to decide whether a fair consideration of the facts and applicable law would have

warranted the special master in recommending against application of the strictures of the "clean hands" doctrine or would have warranted the District Court in accepting such recommendation or have warranted the Court of Appeals in affirming the District Court. If there had been such consideration there would probably be no basis for seeking a review by this Court. The plain facts are that there was no such consideration.

The special master either did not consider the issue of whether Whitewood had been guilty of fraudulent conduct which foreclosed it from relief in a court of equity, or, if he did consider this issue, violated F.R.C.P. Rule 53(e)(I) by failing to make findings of fact and conclusions of law and setting them forth in his report. Similarly, either the District Court did not consider this issue or violated its duty under F.R.C.P. Rule 52(a) by failing to find the facts specially and state separately its conclusions of law thereon.

This Court has long recognized that where an action by a lower court is required to be premised on facts as found by such court it is of the highest importance that there be a fair compliance with this requirement so that there is a basis for a proper appellate review. *Mayo et al. v. Lakeland Highlands Canning Co., Inc. et al.*, 309 U.S. 310, 60 S. Ct. 517, 84 L. Ed. 774 (1940); *Kelley et al. v. Everglades Drainage District*, 319 U.S. 415, 63 S. Ct. 1141, 87 L. Ed. 1485 (1943). Cf. the statement in *Irish et al. v. United States*, 225 F.2d 3 at 8 (CCA 9, 1955) that:

> "The findings should be so explicit as to give the appellate court a clear understanding of the basis of the trial court's decision, and to enable it to determine the ground on which the trial court reached its decision."

When the Court of Appeals was squarely informed of the existence of this issue and of the facts and that the special master and the District Court had either failed to consider this issue or, if they had considered it, had failed to state the facts and conclusions of law, it became its duty either to remand the case for findings of fact and conclusions of law or, since the particular issue was of a type which could properly be decided by an appellate court, to consider and determine this issue without remand. However, it did neither, it did not consider this issue at all and it proceeded to decide the case as though it only involved two other factual issues. This was clearly erroneous, since the resolution of other issues in favor of the plaintiffs would not permit judgment to be granted in favor of the plaintiffs if they had been guilty of fraudulent conduct which foreclosed the granting of relief in a court of equity. The very purpose of the "clean hands" doctrine is to deny relief to which a party would otherwise be entitled.

Down to this point the repeated failures to consider and deal with the "clean hands" issue could have resulted from oversights in a complicated case which would be corrected when called to the attention of the court involved or the appellate court. This possibility does not exist in connection with the denial of the Petition for Rehearing and the conditional request for rehearing in banc.

The Petition for Rehearing was limited solely to the failure to consider the issue of whether Whitewood was guilty of fraudulent conduct which foreclosed it from relief in a court of equity. It specifically directed the attention of the Court of Appeals to the failure of the special master and District Court to consider this issue and to make any findings of fact and conclusions of law with respect thereto. It specifically directed the atten-

tion of the Court of Appeals to its own failure to consider this issue. It specifically directed the attention of the Court of Appeals to the facts that this issue had been properly raised in the pleadings and on the appeal, that there was substantial evidence (largely undisputed) in support of this issue, and that even if Whitewood's contentions might ultimately be sustained after consideration of the facts and law, this did not justify a failure by the courts to consider the facts and law. Finally, it specifically directed the attention of the Court of Appeals to the point that a failure of the courts to consider and pass on all issues which are properly raised and with respect to which substantial evidence is introduced is a denial of due process.

The defendants have the constitutional right under the Fifth Amendment not to "be deprived of life, liberty or property, without due process of law." Insofar as judicial proceedings are concerned, due process involves an opportunity to have a hearing at a meaningful time and in a meaningful manner. *Boddie et al. v. Connecticut,* 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971); *Fuentes v. Shevin,* 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972). While the cases have dealt primarily with such questions as when a hearing must be held (i.e., before or after the particular action complained of) or before whom the hearing is held (i.e., is the tribunal prejudiced against the litigant), it is self-evident that for a hearing to be meaningful requires not only that a litigant shall have a right to present claims and defenses and introduce evidence, but also requires that the court consider and take action on every substantial claim or defense.

The denial of the Petition for Rehearing and of the conditional request for a rehearing in banc constitutes a deliberate decision by the panel which heard the appeal

and by every member of the court on regular active service that trial courts may simply ignore and not consider overriding defenses which, if decided in favor of a defendant, would require judgment for the defendant or, alternatively, that trial courts may make decisions with respect to such defenses without finding the facts and stating conclusions of law and thereby effectually prevent any meaningful appellate review. It further constitutes a deliberate decision that an appellate court may ignore and not consider complaints of error by trial courts and decide appeals as though such complaints had never been made.

It is respectfully submitted that this action by the Court of Appeals sanctions a departure by the District Court from the requirement by this Court that decisions by trial courts must be based on the facts relevant to the particular decision and that trial courts must make findings as to those facts, *Mayo et al. v. Lakeland Highlands Canning Co., Inc., supra,* and therefore sanctions a departure from the accepted and usual course of judicial proceedings. It is further submitted that this action by the Court of Appeals is a departure from the accepted and usual practice of appellate courts either to decide every issue presented by an appeal or to state why they are not deciding a particular issue, where that is appropriate.

These departures from the accepted and usual course of judicial proceedings are of a magnitude which amount to a denial of the constitutional right of the defendants to a full and fair hearing at which every substantial issue is considered, and therefore are of a magnitude which call for the exercise by this Court of its power of supervision.

CONCLUSION

It is respectfully submitted that for the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted

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